A

TELEKOM MALAYSIA BHD

v.

DAYA TIMUR CONSTRUCTION SDN BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CASE NO: 22-58-2010-I]
10 SEPTEMBER 2012

C ***PUBLIC UTILITIES:*** *Telecommunications - Underground cables - Damage to underground cables during piling renovation works - Whether defendant negligent - Liability for trespass - Whether telecommunications provider could enter any land for purpose of erecting telecommunications facility - Duty of care - Whether breached - Whether inquiries made* D *about underground cables - Claim for damages*

TORT: *Trespass to land - Damage to underground cables - Cables damaged during piling renovation works - Liability for trespass - Whether telecommunications provider could enter any land for purpose of erecting* E *telecommunications facility - Communications and Multimedia Act 1998, s. 215*

TORT: *Negligence - Breach of duty - Damage to underground cables - Cables damaged during piling renovation works - Whether defendant breached duty of care by not being reasonable and diligent - Whether* F *inquiries made about underground cables - Whether defendant negligent - Claim for damages*

The plaintiff was a telecommunications provider while the defendant was a contractor engaged to perform certain renovation G works by Pelita Facilities Management Sdn Bhd ('PFM'). PFM was the owner of a building known as Medan Pelita. The plaintiff's case was that the defendant had negligently damaged their underground cables while performing piling during renovation works. As a result of the damage to the copper cables and fibre H optic cables, the telecommunications services were eventually disrupted in the vicinity of Medan Pelita for more than a week. In light of this, the plaintiff filed an action against the defendant for damages in the sum of RM307,364.55. The defendant, however, did not dispute on the quantum of damages suffered by I the plaintiff but denied the plaintiff's claim by alleging, *inter alia*, that (i) they had no knowledge of the underground cables; (ii) the

plaintiff had wrongly laid the cables on the land; and (iii) the plaintiff had committed an act of trespass. The issues that arose for consideration herein were (i) whether the plaintiff was liable for trespass; and (ii) whether the defendant had breached its duty of care by not being reasonable and diligent.

Held (allowing plaintiff's claim with costs):

(1) When the underground cables were laid, the land in question was neither owned nor in the possession of the PFM or its predecessors. In the premises, it cannot be reasonably argued that the plaintiff had wrongly entered the land to lay the underground cables. Even if the plaintiff had committed trespass, it could only be committed against the one who had exclusive possession of the land. The defendant was only a contractor who was commissioned to do renovation works on the land and the possessor of the land in question was PFM. Hence, as only PFM could assert the right of possession, the defendant could not raise the issues of trespass against the plaintiff. (para 15)

(2) Section 215 of the Communications and Multimedia Act 1998 allows a telecommunications provider to enter any land for the purpose of erecting a telecommunications facility. Further, s. 37(a) of the Sarawak Land Code also provides that ownership of land is subject to the implied rights reserved to the government without compensation for the laying down of pipes and cables for water, gas, electricity or communication. These provisions, among others, empower a public utility body or company to lay cables or pipes on any land, public or private. In the premises, the argument that the plaintiff had committed trespass by laying the underground cables was without merit. (para 17)

(3) Contractors who undertake works in the city should have foreseen that public utility companies could have laid underground pipes or cables. This is because the law authorises various public utility bodies or companies to legally encroach upon any land, private or public, to lay pipes or cables for a public purpose. The defendant was conducting piling works in an urban area which was formerly not within the compound of his employer. The area in question was in the middle of the city and piling was done near a public road. For that reason, a reasonable contractor would have foreseen that the pipes and cables could have been laid underground

A and would have made enquiries with his employer or the relevant public utility bodies or companies before proceeding with the piling or drilling works. (paras 20, 21 & 22)

(4) There was no evidence that the defendant made any inquiries about the underground cables. As such, the defendant's failure to make a wayleave application or make any other enquiry in respect of underground cables constituted a breach of duty of care that was owed to the plaintiff. (para 27)

Case(s) referred to:
Donoghue v. Stevenson [1932] AC 562 ***(refd)***
Jaswant Singh v. Central Electricity Board And Anor [1967] 1 LNS 62 HC ***(refd)***
National Coal Board v. J E Evans & Co (Cardiff), Ltd And Another [1951] 2 All ER 310 ***(dist)***
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1994] 4 CLJ 757 HC ***(refd)***
Senik v. Hassan & Anor [1963] 1 LNS 120 HC ***(refd)***

Legislation referred to:
Communications and Multimedia Act 1998, ss. 215, 275
Land Code (Sarawak), s. 37(a)
Telecommunications Act 1950, s. 10(1)

For the plaintiff - Cila Nasu; M/s Yaacob & Ismail Advocates
For the defendant - Wong Sing Nang; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Thirunavakarasu Vijayan

JUDGMENT

Ravinthran Paramaguru JC:

Introduction

[1] This is a claim by the plaintiff for damage caused to their underground cables by a contractor through negligence. The claim is in the sum of RM307,364.55. The defendant has denied the claim on the ground that they had no knowledge of the underground cables as they undertook works on private land, ie, land belonging to their employer. However, the defendant has not disputed the quantum of damages suffered by the plaintiff.

Case For The Plaintiff

[2] The plaintiff is a telecommunications provider. Prior to its privatisation, it was a government department. The defendant is a contractor who was engaged to perform renovation works by Pelita Facilities Management Sdn Bhd (PFM) who is the owner of the Medan Pelita building which sits on Lot 164, Section 48, Kuching Town Land District. The said lot is situated along Lebuh Temple, Kuching. The plaintiff's case is that the defendant damaged their underground cables due to negligence while performing piling during renovation works. As a result, copper cables and fibre optic cables were damaged. It disrupted telecommunications services in the vicinity of Medan Pelita for more than a week. The plaintiff called three witnesses to prove its case.

[3] PW1 was Sharifah Fatimah binti Tuanku Haji Abdullah. She is the plaintiff's manager of facilities. In February of 2009, she was the plaintiff's assistant manager of the Access Planning Unit. Her work scope included granting approvals for wayleave applications. She explained a wayleave application as follows:

> Q : Can you explain what do you mean by an application for wayleave?
>
> A : This is an application made by consultants to projects before commencing excavation, drilling or piling works or any kind of works where the location of the works to be carried out is in the vicinity or at the location where there are either overhead or underground 30 cables or other infrastructures belonging to any public utility providers such as Telekom, Sesco, Kuching Water Board or Sacofa.

[4] She further said that a wayleave application is a standard operating procedure for contractors before commencing excavation or piling works as otherwise they will not be able to identify whether there are underground cables. She said that in respect of the piling works in question that caused damage to the plaintiff's cables, no one had made any wayleave application. Her evidence was not challenged.

[5] PW2 was Saha bin Ludin. He is a technical officer of the plaintiff. He is in charge of repair works involving fibre optic cables. On 23 October 2008 he received information that there was disruption to the plaintiff's network services in the Medan Pelita vicinity. Upon investigation, he found that the disruption of network services was due to the damage occasioned to the underground cables during the renovation works that were carried out at Medan Pelita by the defendant. He said that the repair works were immediately carried out under his supervision and the cables were only replaced after five days. There was no challenge to the evidence of this witness as the counsel for defendant elected not to cross-examine him.

[6] PW3 was Dennis Yap Kim Seng. He is an assistant technical officer of the plaintiff. He has been with the plaintiff for 32 years; ie, from the days it was a government department. He is in charge of repair works involving copper cables. His evidence is similar to that of PW2 who was in charge of fibre optic cables. PW3 said that the copper cables were damaged due to piling works done by the defendant. He was involved in the supervision of repair works which was carried out on a 24-hour basis for five days by about 20 workers. PW3 was also not subjected to cross-examination by counsel for defendant.

[7] PW4 was Padmanathan a/l Sambasivam. He is a manager at the Recovery Work Order Unit of the plaintiff. The function of his unit is to collect compensation from third parties who caused damage to the property of the plaintiff. He said that the first step is to assess the damage and identify the party that caused the damage in question. After restoration works are completed, his unit would send "a liability letter" to the party that caused the damage. In the instant case, the plaintiff had identified the defendant as the party that caused damage to the underground cables at Medan Pelita and caused disruption of network services. The deputy general manager of the plaintiff issued a letter on 6 November 2009 to the defendant and demanded the sum of RM307,364.55 for the loss suffered by the plaintiff inclusive of costs of repair of the plaintiff's underground cable at Medan Pelita, Leboh Temple, Kuching. I find it unnecessary to delve into the rest of his testimony in respect of the breakdown of figure of RM307,364.55 for the reason that the defendant has not disputed the loss suffered by the plaintiff. PW4 was not cross-examined by the counsel for defendant as well.

[8] The fifth witness was not called to the witness stand to testify as he was away in Australia. However, counsel for defendant agreed to the admission of his proposed witness statement as an agreed fact without any cross-examination. In the premises, the witness statement of Chua Yan Phuan was admitted into evidence as part of the plaintiff's case. Mr. Chua is a technical officer with the Network Maintenance Unit of the plaintiff. He said that the defendant never made any wayleave application or inquired with his unit whether there were any underground cables in the area where they carried out piling works. The rest of his witness statement was in respect of the damages sustained by the plaintiff which was not disputed.

Case For Defendant

[9] The defendant did not deny causing damage to the cables in question. However, they denied liability. Two witnesses gave evidence for the defendant.

[10] The first witness was Kong Fah Ying (DW1). He is a director of the defendant. He said that on 7 August 2008, the defendant was awarded a tender to do renovations works to the Medan Pelita building by Pelita Facilities Management Sdn Bhd (PFM). He said that PFM was not aware of the underground cables that had been laid by the plaintiff. He said that the cables were laid on the land wrongfully and that the plaintiff had committed trespass. He also said that the surveyor engaged by the defendant had confirmed that the renovation works were carried out within the boundary of the land owned by PFM. He said that the renovation works were carried out in accordance with the drawings, plan and specifications of the contract in question. Furthermore, the defendant had taken safety precautions and had studied and identified the incoming cables to Medan Pelita within the said land. The defendant never expected that underground cables had been laid within the compound of Medan Pelita. In respect of the wayleave application, he said in the supplementary witness statement that the plaintiff never registered the underground cables as "public utility layout plan easement" with the Lands and Surveys Department. He said that even if there was a requirement for wayleave application, it only applied to works conducted in public places. During cross-examination, he agreed that as the land belonged to his client, he did not check with the plaintiff.

[11] The second witness was a surveyor; John Chew of Resources Surveys Services (DW2). He was engaged by the defendant to conduct a survey and to set out the pile points in accordance with the approved architectural plan being prepared by the consultants. His survey plan was tendered into evidence. During cross-examination he agreed that his scope of work did not include looking into the possibility of existence of underground cables.

Issues

[12] At the outset of the trial, counsel for defendant submitted that the issues for trial are as follows:

> The two main issues to be decided is whether the plaintiff by laying utility cable underground through the defendant's private land without defendant's permission or knowledge has committed an act of trespass. If the answer to the above question is positive then the plaintiff is not entitled to damages.
>
> The second issue is whether the defendant has done all reasonable and diligent work in accordance with the plan and if the answer is affirmative then there will be no damages claimable.
>
> If liability is established, we will not be disputing the quantum of damages claimed, so there will be no need to go into the receipt of the sub contractors who repaired the cables and so on, there will be no need for cross examination on that.

[13] Counsel for plaintiff agreed that the above are the two main issues in this case.

Whether The Plaintiff Was Liable For Trespass?

[14] It is not disputed that the underground cables in question were located within the project boundary of the renovation works commissioned by PFM, the employer of the defendant. The defendant did not call any witness from PFM save to say that they had no knowledge of the underground cables on the compound. There is no evidence that the land under which the cables had been laid belongs to PFM. However, in my opinion, the plaintiff had not committed any trespass by laying the cables in an area which is now within the project boundary in question.

My reasons are as follows. In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1994] 4 CLJ 757; [1994] 3 MLJ 530, a trespasser is described as follows:

> Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & sons (Collieries) Ltd v. Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one 'who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to'.

[15] The plaintiff can be held as a trespasser only if they had wrongly laid the underground cables on land belonging to another. In the instant case, the contention of the plaintiff was that the underground cables were laid on the land in question before additional easements were granted to the owners of the land. Thus the plaintiff contended that it was after the "approval" of the "additional easements" that the plaintiff's underground cables came within the project site of the renovation works conducted by the defendant. This contention was not challenged by the defendant as none of the plaintiff's witnesses were cross-examined. Thus, when the undergrounds cables were laid, the land in question was neither owned nor in the possession of the PFM or its predecessors. In the premises, it cannot be reasonably argued that the plaintiff had "wrongly" entered the land to lay the underground cables. Even if the plaintiff had committed trespass, counsel for plaintiff is correct to submit that it can only be committed against one who has exclusive possession of land. The defendant is only a contractor who was commissioned to do renovation works on the land. The possessor of the land in question is PFM. Trespass is the tort of causing injury to the possessory right of another (see *Senik v. Hassan & Anor* [1963] 1 LNS 120; [1963] MLJ 368). As only PFM can assert the right of possession, the defendant cannot raise the issue of trespass against the plaintiff. However, in my opinion, the plaintiff has not committed trespass as it is undisputed that their initial entry into the land to lay the cables was lawful. It is also my view that the subsequent granting of additional easements to PFM by the Lands and Surveys Department that brought the land within the boundary of the Medan Pelita building did not render the presence of the cables unlawful. The defendant has not tendered

any evidence to argue that the granting of additional easements to PFM had resulted in expansion of Lot 164 on which Medan Pelita building is located. Even if it is true that the location on which the cables had been laid is in the possession of PFM, it cannot be argued that the presence of the underground cables is unlawful for the following reason. It was not disputed that the cables were laid when the plaintiff was still a government department. Under the repealed Telecommunications Act 1950 (revised 1970), s. 10(1) permits a telecommunication authority to:

> … to maintain a telecommunication line or equipment under, over, along or across, and telecommunication equipment or posts in or upon, any immovable property.

[16] The above law was repealed by the Communications and Multimedia Act 1998 but there is a saving provision in s. 275. It preserves the validity of any act or decision performed under the old Act. It reads as follows:

> 275. Savings.
>
> Any registration, act, order, direction, approval or decision done, made or given before the date of coming into operation of this act shall be deemed to have been done, made or given under this Act and shall continue in full force and effect in relation to whom they apply until amended or revoked under this Act or new rules, regulations or other subsidiary legislation are made under it or until the date of its expiry.

[17] The Communications and Multimedia Act 1998 also contains a similar provision in s. 215 to allow a telecommunications provider to enter any land for the purpose of erecting telecommunications facility. Section 37(a) of the Sarawak Land Code also provides that ownership of land is subject to the implied rights reserved to the government without compensation for the laying down of pipes and cables for water, gas, electricity or communication. The above provisions empower a public utility body or company to lay cables or pipes on any land, public or private. In the premises, the argument that the plaintiff had committed trespass by laying the underground cables is without merit.

Whether Defendant Breached Duty Of Care By Not Being Reasonable And Diligent?

[18] The basic facts are not in dispute in this case. The plaintiff's telecommunications cables had been damaged due to piling works. The quantum of damages is not disputed. The piling works were undertaken by the defendant who is a contractor engaged by PFM, the owner of Menara Pelita building. The land on which the cables were buried came within the project boundary of the Medan Pelita building after additional easements were granted to PFM. The plea of the plaintiff against the defendant is common law negligence. In the premises, it may be necessary to hearken to the celebrated formulation of Lord Atkins on the "neighbour principle" in *Donoghue v. Stevenson* [1932] AC 562 which is as follows:

> The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

[19] In the instant case, the relevant question is whether the defendant should have made a wayleave application with the plaintiff before proceeding with piling works in an urban area. PW1 testified that a wayleave application is mandatory before excavation or piling works are carried out. She said as follows in her witness statement:

> Q : Is this application for wayleave necessary?
>
> A : Yes. There is a standard operating procedure that prior to commencing works such as drilling or excavating or piling at a location where there are plants or infrastructures belonging to public utility companies, it is incumbent upon the consultants of contractors doing the construction, drilling, piling or excavating works to apply for wayleave. If not, they will not be able to identify whether there are underground cables or not and any damaged caused will be their sole responsibility. They will only know about this once wayleave is approved. In their application for wayleave they must also annexed their own layout plan for the works to be carried out.

[20] Her evidence was not challenged by way of cross-examination. The defendant was doing piling in an urban area and the said area came within the project boundary of the Medan Pelita building only because additional easements were granted to its owner by the Lands and Surveys Department. To my mind, contractors who undertake works in the city should have foreseen that public utility companies could have laid underground pipes or cables. This is because the law authorises various public utility bodies or companies to legally encroach upon any land, private or public, to lay pipes or cables for a public purpose. As I have pointed out, the Sarawak Land Code has also recognised the implicit right of these bodies to do so under s. 37(a). In the case of *Jaswant Singh v. Central Electricity Board And Anor* [1967] 1 LNS 62; [1967] 1 MLJ 272, the court in applying the "neighbour principle" ruled that the defendant is not required to foresee the particular loss suffered by the plaintiff as long as:

> ... if it was reasonable in a general way to foresee the kind of thing that occurred.

[21] To recapitulate, the defendant was conducting piling works in an urban area which was formerly not within the compound of his employer. The piling works were not done deep inside the compound of the Medan Pelita building but along the edge of the project boundary which is near a public road. In fact, the cable ran parallel along Temple Street. Therefore it should have been within the defendant's contemplation that there could be underground pipes or cables in the area. DW1 did not even tell the court whether the defendant had made any proper enquiries with the management of PFM about underground pipes or cables. In fact, after damage was caused to the cables, PFM wrote a letter to the solicitors of the defendant that hinted that the defendant was instructed to do their own investigation in respect of underground cables. The said letter which was written on 29 June 2010 was signed on behalf of the chief executive officer of PFM and shorn of formalities, it reads as follows:

> 2. Further to discussion with our consultant, we were informed that they were unaware of an underground cables passing through the said land as there was no visible indications on site.
>
> 3. Our consultant have provided all the necessary and available information to your client and **have instructed your client to do their investigation prior to construction** which to the best of our consultant's knowledge, your client have done accordingly. (emphasis added)

[22] DW1 only said that the defendant had adhered to the architectural and structural plan. Quite obviously, the defendant has to make reference to those plans as they had been contracted to carry out the renovation works. However, those plans would not indicate the placement of underground cables or pipes. Thus the defendant did not make any investigation about the underground pipes or cables from either the plaintiff or even the local authority which is the Kuching North City Hall (DBKU). DW1 had insisted that the land on which piling works were conducted were the registered land of PFM and, therefore, private land. As I noted earlier, the evidence of PW1 is that the spot of land under which the cables were damaged came within the project boundary of the Medan Pelita building only because of additional easements. However, even if the cables were on private land, the said fact cannot afford a defence. This is because the law permits the laying of cables and pipes for a public purpose on any land. The area in question is in the middle of the city and piling was done near a public road. For that reason, a reasonable contractor would have foreseen that the pipes or cables could have been laid underground and would have made enquiries with his employer or the relevant public utility bodies or companies before proceeding with the piling or drilling works. In the instant case, the defendant had admitted that no wayleave application was made to the plaintiff which is the successor company of the Telecommunications Department. DW1 did not even say if he had requested the employer to make enquiries of his behalf.

[23] However, counsel for defendant submitted that the absence of knowledge of the underground cables on the part of the defendant is crucial. In support, he cited the case of *National Coal Board v. J E Evans & Co (Cardiff), Ltd And Another* [1951] 2 All ER 310. The head note to the case report reads as follows:

> The first defendants, who had obtained a contract from a county council to erect workshops on land belonging to the council, sub-contracted with the second defendants to excavate a trench across the land for drainage purposes. Without the knowledge of the council the plaintiffs' predecessors had placed an electric cable under the land, running across the line of the proposed trench at the same depth as the trench would be at that spot, and carrying electric current to a colliery belonging to the plaintiffs. The first defendants had been supplied by the council with a plan of the land showing the line of the required trench, but the underground cable was not marked on it, and neither the first defendants nor the second defendants knew of its existence.

[24] The English Court of Appeal held that the plaintiff's were at fault as:

> … the accident being attributable mainly to the conduct of their predecessors in placing the cable on the council's land without the knowledge of the council, and as the defendants were entirely free from fault, having merely done what they were required by the council to do, there was no trespass by them.

[25] In my view, the facts of the above case are clearly distinguishable from the instant one. The plaintiff's predecessor in the above case had no legal right to lay the cables on the said land and had not sought permission to do so either. For that reason, it was not marked on county plans. Cohen LJ in attaching blame to the conduct of the plaintiff's predecessor said as follows:

> The cable was not visible, and there was nothing on the plan of the Glamorgan County Council to indicate its presence. It had been placed there without the knowledge of the county council and without any permission from them. In those circumstances, I can see no ground for attaching any blame to the defendants. The damage seems to have been caused by the action of the predecessors in title of the plaintiffs themselves, who, the judge has found, placed their cable on the land in question without any legal right to do so and, so far as we know, without taking any steps to inform the county council or anyone else of the presence of the cable on the land.

[26] In the instant case, the plaintiff was formerly the Telecommunications Department. As stated earlier, they were authorised by law to lay the cables in question. The defendant has not disputed the fact that the cables were laid on land that was formerly outside the compound of the Pelita Medan building. In fact, the evidence of PW1 on this point was unchallenged. As for the markings on the plan, PW1 testified that the placements of cables are marked in the plaintiff's layout plan from the Local Network Management System (LNMS). PW1 said that if the plaintiff received a wayleave application, the Access Network Department of the plaintiff would mark the exact location of the overhead and underground cables on a layout plan and returned it to the applicant. In *National Coal Board v. J E Evans & Co (Cardiff), Ltd And Another* (*supra*), the plaintiff's predecessor had laid the cables on land belonging to the County Council without their permission and knowledge. It is for this reason that the

plaintiff's predecessor was considered as trespassers by the Court of Appeal. For the reasons given earlier, I have ruled that in the instant case, the plaintiff cannot be considered as a trespasser. In the premises, with respect, I am of the opinion the above mentioned authority is not applicable to the instant case.

Conclusion

[27] In conclusion, the evidence of the plaintiff that it is the standard practice to make a wayleave application to find out about underground cables was not challenged. The defendant admitted not making a wayleave application. There is no evidence that the defendant made any other inquiries either about underground cables. The piling was done in an urban area. The evidence of the plaintiff that the area came within the compound of the employer of the defendant only because of additional easement was not challenged either. A reasonable person, especially a contractor, should have foreseen the existence of the cables in question. In the premises, the failure of the defendant to make a wayleave application or make any other enquiry in respect of underground cables constituted a breach of duty of care that is owed to the plaintiff. I, therefore, find the defendant liable and shall enter judgment for the plaintiff in the sum of RM307,364.55 under prayer (a) of the statement of claim with costs of RM25,000. There shall be post judgment interest of 5% from date of judgment.